CLERK'S COPY 23492

55

1105
T.C.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 196.

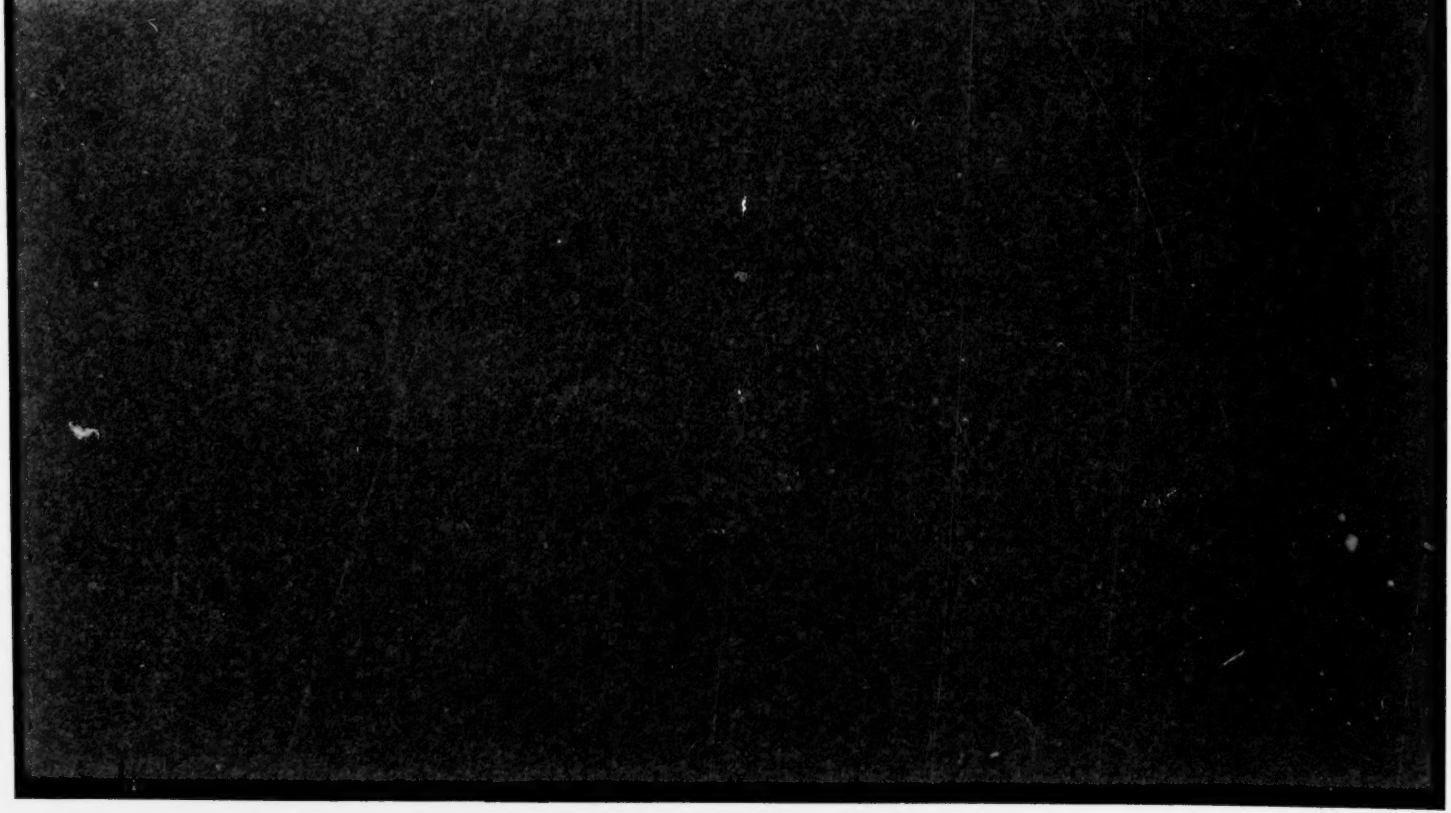
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE MISSION ROCK COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED SEPTEMBER 26, 1903.
(23492.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 198.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE MISSION ROCK COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States for the northern district of California	1	1
Complaint	1	1
Summons	4	2
Marshal's return	5	3
Answer	6	3
Stipulation waiving jury	9	4
Stipulation to substitute Mission Rock Company as defendant	10	5
Order substituting Mission Rock Company as defendant	11	5
Amended and supplemental complaint	12	6
Answer to amended and supplemental complaint	17	8
Findings of fact	20	10
Conclusions of law	26	13
Stipulation for supplemental finding	26	13
Supplemental finding	27	13
Judgment	28	14
Certificate to judgment roll	31	15
Opinion	32	15
Bill of exceptions	37	17
Exception to judgment	37	17
Judge's certificate to bill of exceptions	38	18
Agreement as to bill of exceptions	38	18

27763—02——0

	Original.	Print.
Transcript from the circuit court of the United States for the northern district of California—Continued.		
Petition for writ of error	38	18
Order allowing writ of error	40	18
Assignment of errors	40	18
Order staying proceedings	44	20
Supersedeas bond	45	20
Clerk's certificate to record	50	23
Writ of error	51	23
Return on writ of error	53	24
Citation and service	54	25
Opinion	56	25
Judgment	72	33
Petition for writ of error	73	34
Order allowing writ of error	74	34
Assignment of errors	75	35
Clerk's certificate	86	41
Writ of error	87	41
Return to writ of error	88	42
Citation	89	42
Proof of service of citation	90	42

No. 682.

In the United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY (A CORPORATION), plaintiff in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

TRANSCRIPT OF RECORD.

In error to the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California.

1 In the circuit court of the United States, ninth circuit, northern district of California.

AT LAW.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CALIFORNIA DRY DOCK COMPANY (A corporation), defendant.

Complaint in ejectment.

Now comes the said plaintiff, the United States of America, and complains of the said defendant, and for cause of action alleges:

I.

That the defendant, The California Dry Dock Company, has, at all the times in this complaint mentioned, been, and now is, a corporation, duly organized and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State and northern district of California.

II.

2 That heretofore, to wit, on the 2d day of January, 1870, the said plaintiff was, and for a long time previous thereto had been, and continuously since has been, and now is, the owner and seised in fee, and entitled to the possession, of all that certain tract of land situate in the State and northern district of California, and described as follows, to wit:

Commencing at a point in the bay of San Francisco, State and northern district of California, distant 3,570 feet southeasterly from the southerly corner of Brannan and Second streets, said distance being measured along the extension, southeasterly of the southwesterly line of Second street; thence in a southwesterly direction at right angles with said line of Second street extended, 500 feet; thence at right angles southeasterly 800 feet; thence at right angles northeasterly 800 feet; thence at right angles northwesterly 800 feet; thence at right angles southwesterly 300 feet to the point of commencement.

Said tract of land being a square including the rock known as Mission

Rock, and containing 14.69-100 acres, more or less, and being a fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian.

III.

That afterward, to wit, on the 1st day of May, 1878, and while the plaintiff was the owner of and entitled to the possession of said tract of land as aforesaid, the said defendant wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff there-
3 from and from the whole thereof, and from thence to the present time has wrongfully and unlawfully withheld, and now wrongfully and unlawfully withholds possession of said premises from the plaintiff to its damage in the sum of two hundred and fifty thousand ($250,000) dollars.

IV.

That the plaintiff is informed and believes, and upon such information and belief so avers, that the value of the rents, issues, and profits of said tract of land, ever since the said wrongful and unlawful entry of the defendant thereon, has been, and now is, the sum of five thousand ($5,000) dollars per annum.

Wherefore, the said plaintiff prays for judgment against the said defendant for the possession of all of the said tract of land aforesaid, and for the sum of two hundred and fifty thousand ($250,000) dollars, for the damages aforesaid, and for one hundred and five thousand ($105,000) dollars for the value of the rents, issues, and profits aforesaid, and for costs of suit.

FRANK L. COOMBS,
United States Attorney, Attorney for Plaintiff.
MARSHALL B. WOODWORTH,
Assistant United States Attorney, of Counsel.

(Endorsed:) Filed September 21, 1899. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

4 UNITED STATES OF AMERICA.

Circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CALIFORNIA DRY DOCK COMPANY (A CORPORATION), defendant.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

Summons.

The President of the United States of America, greeting, to the California Dry Dock Company (a corporation), defendant.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the circuit court of the

United States, ninth circuit, in and for the northern district of California, within ten days after the service on you of this summons, if
5 served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the court for any other relief demanded in the complaint.

Witness, the honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of September, in the year of our Lord one thousand eight hundred and ninety-nine, and of our Independence the one hundred and twenty-fourth.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*,
By W. B. BEAIZLEY, *Deputy Clerk*.

(Endorsed:) United States marshal's office, northern district of California. I hereby return that I received the within writ on the 21st day of September, 1899, and personally served the same on the 22d day of September, 1899, upon The California Dry Dock Company (a corporation), by delivering to and leaving with John Meyer, president of said The California Dry Dock Company (a corporation), said defend-
6 ant named therein, personally, at the city and county of San Francisco, in said district, an attested copy thereof, together with a copy of the complaint certified to by the United States attorney attached thereto.

San Francisco, September 22d, 1899.

JOHN H. SHINE,
United States Marshal,
By S. P. MONCKTON,
Office Deputy.

Filed September 22d, 1899. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the circuit court of the United States for the ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
v.
THE CALIFORNIA DRY DOCK COMPANY, DEFENDANT.

Answer.

Now comes The California Dry Dock Company, defendant in the above-entitled cause, and answering unto the complaint of the plaintiff therein avers as follows:

I.

It admits that the defendant is and has been a corporation as averred in said complaint.

7 II.

It denies that on the second day of January, 1870, the plaintiff was, or for a long time previous thereto had been, or continuously since or at any

time since has been or now is the owner or seised in fee, or entitled to the possession of all or any part of the land described in the complaint.

III.

It denies that on the first day of May, 1878, or at any time, while the plaintiff was the owner or entitled to the possession of the said land or otherwise, it wrongfully or unlawfully entered in or upon the same, or ousted or ejected the plaintiff therefrom or the whole or any part thereof, or that from thence to the present time, or that at any time, it has wrongfully or unlawfully withheld, or that it now wrongfully or unlawfully withholds, possession of said premises, or any part thereof, from the plaintiff, to its damage in the sum of two hundred and fifty thousand dollars, or any sum whatsoever.

The defendant further answering avers that it, the defendant, has been since the first day of May, 1878, and now is seised and the owner in fee of the said premises and in the lawful possession thereof, and that no other person or corporation is the owner thereof, and that the plaintiff was not at the time alleged in the complaint, or at any time since said date, and is not now, the owner, or entitled to the possession of the said premises, or any part thereof.

8 IV.

It denies that the value of the rents, issues, and profits of the said lands have been or are the sum of five thousand dollars per annum or any sum. And it further denies that it at any time entered unlawfully upon the said land.

Wherefore, the defendant prays judgment that the complaint be dismissed.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

I hereby certify that in my opinion the foregoing answer is well founded in point of law.

CHAS. PAGE,
One of the Counsel for Defendant.

(Endorsed:) Service of a copy of the within answer is hereby admitted this 3d day of November, 1899.

FRANK L. COOMBS,
Attorney for Plaintiff.

Filed November 3d, 189?. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

9 In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CALIFORNIA DRY DOCK COMPANY, DEFENDANT. } No. 12817.

Stipulation waiving trial by jury.

Now comes the plaintiff, by Frank L. Coombs, United States attorney, and Marshall B. Woodworth, assistant United States attorney for the

northern district of California, its attorneys, and the defendant, by Messrs. Page, McCutchen, Harding, and Knight, its attorneys, and waives a jury in the above-entitled cause, and stipulate that said cause be tried by the court sitting without a jury.

FRANK L. COOMBS,
United States Attorney, for Plaintiff.
MARSHALL B. WOODWORTH,
Assistant United States Attorney, for Plaintiff.
PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

(Endorsed:) Filed July 27th, 1900. Southard Hoffman, clerk.

10 In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
CALIFORNIA DRY DOCK COMPANY, DEFENDANT.

Stipulation of parties substituting defendant.

It is hereby stipulated and agreed that pending the hearing of this cause the defendant, California Dry Dock Company, sold and transferred to the Mission Rock Company, a corporation, its title to the property sued for therein, and that the Mission Rock Company thereupon entered into and now has the sole possession thereof. It is stipulated that the Mission Rock Company may be substituted as defendant in this action as of the date of June seventh, 1900, and that all proceedings herein be continued as against the said substituted defendant with the same force and effect as they would have against the original defendant if no substitution had been made.

It is further stipulated that the appearance of Messrs. Page, McCutchen, Harding & Knight as attorneys for the Mission
11 Rock Company is hereby entered and that amended and supplemental pleadings as may be ordered by the court be filed against the Mission Rock Company.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff.
PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

Order substituting defendant.

On reading and filing the foregoing stipulation, and it appearing to the court that since the submission of this cause all the title of The California Dry Dock Company in and to the property sued for in this cause has been sold and transferred to the Mission Rock Company, a corporation, and that said last-named company is in sole possession of the said property, and it further appearing that the Mission Rock Company is the proper party to this suit and should be substituted as defendant in place

of The California Dry Dock Company, and it further appearing that said Mission Rock Company, by Page, McCutchen, Harding & Knight, its attorneys, and attorneys for The California Dry Dock Company, applies for the said substitution and that the attorneys of the United States consent:

It is ordered as follows: That the Mission Rock Company be, and it is hereby, substituted as defendant in this cause in place of The
12 California Dry Dock Company, nunc pro tunc, as of June 7th, 1900, and that all proceedings in this cause be taken and this cause continued against the Mission Rock Company as such substituted defendant.

It is further ordered that amended and supplemental pleadings be filed in this cause against the Mission Rock Company as defendant, and that the said defendant make answer thereto, and that the same be filed as of June 7, 1900, nunc pro tunc.

JAS. H. BEATTY, *Judge.*

(Endorsed:) Filed January 11, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), substituted for The California Dry Dock Company (a corporation), defendant.

Amended and supplemental complaint.

Now comes the plaintiff, the United States of America, and by leave of court first had and obtained, files this its amended and supplemental complaint, and alleges:

13 I.

That the defendant Mission Rock Company is, and at all times since a period anterior to June 6th, 1900, has been, a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State and northern district of California.

II.

That heretofore, to wit, on the 2d day of January, 1870, the said plaintiff was, and for a long time previous thereto had been, and continuously since has been and now is, the owner and seised in fee, and entitled to the possession, of all that certain tract of land situate in the State and northern district of California and described as follows, to wit:

Commencing at a point in the Bay of San Francisco, State and northern district of California, distant 3,570 feet southeasterly from the southerly corner of Brannan and Second streets, said distance being

measured along the extension, southeasterly of the southwesterly line of Second street; thence in a southwesterly direction at right angles with said line of Second street extended, 500 feet; thence at right angles southeasterly 800 feet; thence at right angles northeasterly 800 feet; thence at right angles northwesterly 800 feet; thence at right angles southwesterly 300 feet to the point of commencement.

Said tract of land, being a square including the rock known as
14 Mission Rock, and containing 14 69-100 acres, more or less, and being a fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian.

III.

That after'ards, to wit, on the 1st day of May, 1878, and while the plaintiff was the owner of and entitled to the possession of said tract of land as aforesaid, the said The California Dry Dock Company wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff therefrom and from the whole thereof, and from thence up to the 6th day of June, 1900, wrongfully and unlawfully withheld possession of the said premises from the plaintiff, to its damage in the sum of two hundred and fifty thousand (250,000) dollars.

That prior to said sixth day of June, 1900, to wit, on or about the 21st day of September, 1899, this plaintiff brought in this court its certain action of ejectment against the said The California Dry Dock Company for the recovery of the possession of the premises aforesaid and for damages as aforesaid, which said action was on the said sixth day of June, 1900, still pending and undetermined in this court.

That on said sixth day of June, 1900, the said The California Dry Dock Company executed a written instrument of deed and delivered the same to the Mission Rock Company, defendant herein, wherein and whereby it purported to convey to the said defendant all of the lands and premises hereinbefore described and sued for by this plain-
15 tiff, and the said defendant thereupon entered into possession of the said premises and now wrongfully and unlawfully withholds the same from the plaintiff, to its damage in the sum aforesaid.

IV.

That heretofore, to wit, on the day of December, 1900, this honorable court, on stipulation of the parties in the said cause originally pending herein, and on the request and motion of counsel of the Mission Rock Company, then and there duly authorized to enter an appearance for the Mission Rock Company, defendant, made and entered an order in said cause substituting the Mission Rock Company as defendant in place of The California Dry Dock Company, previously defendant therein as aforesaid, and ordering that all further proceedings in said cause be continued against said Mission Rock Company, in place of the California Dry Dock Company, and that the plaintiff be authorized to file in said cause an amended and supplemental complaint against the Mission Rock Company, defendant, substituted as aforesaid, and that the said defendant enter its appearance therein, and answer the said amended and supplemental complaint.

V.

That the plaintiff is informed and believes, and upon such information and belief so avers, that the value of the rents, issues, and profits of said tract of land, ever since the said wrongful and unlawful entry of the defendant thereon, has been, and now is, the sum of five thousand (5,000) dollars per annum.

16 Wherefore the said plaintiff prays for judgment against the said defendant for the possession of all the said tract of land aforesaid, and for the sum of two hundred and fifty thousand (250,000) dollars for the damages aforesaid, and for one hundred and five thousand (105,000) dollars for the value of the rents, issues, and profits aforesaid, and for costs of suit.

FRANK L. COOMBS,
United States Attorney,
And MARSHALL B. WOODWORTH,
Assistant United States Attorney.

(Endorsed:) Service of the within amended and supplemental complaint by copy admitted this 27th day of December, 1900.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

Filed January 11, 1901, nunc pro tunc as of June 7, 1900. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

17 In the circuit court of the United States, for the ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), substituted for The California Dry Dock Company (a corporation), defendant.

Answer to amended and supplemental complaint.

Now comes the Mission Rock Company, defendant in the above-entitled cause, substituted for The California Dry Dock Company, and answering unto the amended and supplemental complaint of the plaintiff avers as follows:

I.

It admits that the defendant is and has been a corporation as averred in the complaint.

II.

It denies that on the second day of January, 1870, the plaintiff was, or for a long time previous thereto had been, or continuously since or at any time since has been or now is the owner or seised in fee, or entitled to the possession of all or any part of the land described in the complaint.

18

III.

It denies that on the first day of May, 1878, or at any time, while the plaintiff was the owner or entitled to the possession of the said land or otherwise, The California Dry Dock Company unlawfully entered in or upon the same, or ousted or ejected the plaintiff therefrom, or the whole or any part thereof, or that the said The California Dry Dock Company from thence up to the 6th day of June, 1900, or at any time, wrongfully or unlawfully withheld possession of the said premises, or any part therefrom, from the plaintiff to its damage in the sum alleged, or in any sum.

The defendant admits that prior to the said sixth day of June, 1900, to wit, on or about the 21st day of September, 1899, the plaintiff brought in this court the action in the amended and supplemental complaint described and that said action was on the sixth day of June, 1900, pending and undetermined in this court, and it admits that on said day The California Dry Dock Company executed and delivered to this defendant the instrument of conveyance in said complaint described, and that the defendant thereupon entered into possession of the said premises and that it now withholds the same from the plaintiff; but it denies that it withholds the same to the damage of the plaintiff in the sum alleged or in any sum.

The defendant further avers that the said The California Dry Dock Company, grantor of this defendant was from the first day of May, 1878, and up to the sixth day of June, 1900, seised and owner in fee of

19 the premises sued for, and that since said date this defendant, as its grantee, has been and now is seised and owner in fee and in the lawful possession thereof, and that no other person or corporation is the owner thereof, and that the plaintiff was not at the time alleged in the amended and supplemental complaint or at any time since said date, and is not now the owner or entitled to the possession of the said premises, or any part thereof.

IV.

It denies that the value of the rents, issues, and profits of the said lands have been or are the sum of five thousand dollars per annum or any sum, and it further denies that it at any time entered unlawfully upon the said land.

Wherefore, it prays judgment that plaintiff's action be dismissed.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

(Endorsed:) Service of a copy of the within answer is hereby admitted this 10th day of January, 1901.

MARSHALL B. WOODWORTH and
FRANK L. COOMBS,
Attorneys for Plaintiff.

Filed January 11, 1901, nunc pro tunc as of June 7, 1900. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

COPY BOUND CLOSE IN CENTER

20 In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
MISSION ROCK COMPANY, SUBSTITUTED FOR California Dry Dock Company, defendant.

Findings.

The above cause having come on regularly to be heard before the court, a jury having been waived, the court having heard and considered the pleadings and the evidence, hereby files its findings of fact and conclusions of law:

I.

The defendant, Mission Rock Company, is and since a date anterior to June 6, 1900, was a corporation organized and existing under the laws of the State of California, and pending the hearing of this cause became, by virtue of a deed of grant, bargain, and sale from The California Dry Dock Company, dated June 6th, 1900, the owner of all the title and interest of The California Dry Dock Company in and to the premises in controversy, and thereupon entered into and now holds the possession of the same.

21 On request of the Mission Rock Company and proof of the fact that the said company had acquired the interest of The California Dry Dock Company in the lands sued for and by consent of the plaintiff, this court made an order substituting the Mission Rock Company for The California Dry Dock Company as defendant, and continuing this action against said Mission Rock Company as defendant.

II.

At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than twenty and less than forty feet above such high water. Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause marked Exhibit "A."

III.

The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State of California into the Union were as follows: The one on the chart called "Mission Rock" had an area of fourteen one-hundredths (14-100) of an acre; the other had an area of one one-hundredth (1-100) of an acre. These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides to the

22 extent that they were covered and uncovered by the flow and ebb of the tide varied from ten to twenty-five feet, depending on

their steepness. Both rocks were barren, without soil or water, and were of no value for purposes agricultural or mineral. They lay at a distance of about half of a mile from the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable water divided and still divide the lands sued for from the mainland and surrounded and now surround them.

IV.

The lands described in the complaint were not, at the date of the admission of the State of California into the Union, within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican Governments.

V.

No approved plat of the exterior limits of the city of San Francisco, as provided by the terms of section 5 of the act of July 1, 1864 (13 Stat., 332), has been filed or rendered to the General Land Office of the United States, or of the State of California. The lands sued for in this action are within such exterior limits.

VI.

On the thirteenth day of January, 1899, the President of the United States, purporting to act in conformity with the act of July 1, 1864, already referred to, issued the following order:

23 "EXECUTIVE MANSION, *January 13, 1899.*

"It is hereby ordered that Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

"WILLIAM MCKINLEY."

VII.

On the day of March, 1864, the United States surveyor-general for the State of California extended the public surveyors so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

VIII.

On April 4th, 1870, the governor of the State of California approved an act of the legislature of the State entitled "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor," which act was printed in the Statutes of California for the years 1870–1871, at page 801, is hereby referred to and made part hereof.

The lands therein described include the lands sued for in this action.

On the 11th day of July, 1872, the State of California, in con-
24 formity with said act, issued its patent for the said lands to said Henry B. Tichenor, purporting to convey the same to him. Said patent was duly recorded in liber 1 of Records of Patents, page 66.

After execution of the said patent the said Tichenor executed and delivered a deed of grant, bargain, and sale, dated May 1st, 1878, purporting to convey the said lands to The California Dry Dock Company, which thereafter, on the 6th day of June, 1900, executed and delivered to the Mission Rock Company, the defendant, a like deed to the said lands. The last-named company has not since said date conveyed to any person or corporation the said lands.

IX.

The California Dry Dock Company, upon going into possession of said lands so conveyed undertook the improvement of the same by filling in portions of the submerged lands immediately around and contiguous to said islands or rocks, with many thousands of tons of rock, thus increasing the available area of said lands to about four acres, upon which extensive warehouses were built by it, and wharves erected for the accommodation of shipping.

Since the issuance of the State patent hereinbefore referred to the patentee thereof up to May 1st, 1878, The California Dry Dock Company from said time to the 6th day of June, 1900, and the defendant from said last-named date to the present time, have been in continuous and uninterrupted possession of the said lands, using the same and the improvements thereon for commercial purposes, and claiming to be the absolute owner thereof.

X.

On April 7th, 1890, Col. Geo. H. Mendell, then in charge of the Corps of Engineers of the United States Army on the Pacific coast, caused to be served on the California Dry Dock Company the following notice:

"UNITED STATES ENGINEER OFFICE,
"No. 533 KEARNY STREET,
"*San Francisco, Cal., April 7th, 1890.*

"Captain OLIVER ELDRIDGE,
"*President California Dry Dock Company, 303 California Street, San Francisco, Cal.*

"SIR: Under the provisions of section 12 of the river and harbor act of August 11th, 1888 (a copy of which is enclosed), a board of engineer officers was appointed to establish the harbor lines of San Francisco Harbor and adjacent waters. There is transmitted herewith, for your information, a map, upon which are shown the limiting lines of wharves and the line beyond which no deposits shall hereafter be made, at Mission Rock, as established by the board and approved by the Secretary of War March 24th, 1890.

"Very respectfully,
"G. H. MENDELL,
"*Colonel, Corps of Engineers.*"

The limits referred to in the above letter, and delineated on the map, are in effect the limits of "Mission Rock" as improved at that time.

CONCLUSIONS OF LAW.

Upon the foregoing facts, I find that the title to the lands described in the complaint is in the United States and that it is entitled to judgment for the possession thereof. Let judgment be entered accordingly.

JAS. H. BEATTY, *Judge.*

Agreed to.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff.

In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
MISSION ROCK COMPANY, SUBSTITUTED FOR CALIFORNIA DRY DOCK COMPANY, defendant.

Stipulation and supplemental finding.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following supplemental finding of fact may be, and is hereby, made part of the findings heretofore signed by Hon. James H. Beatty and agreed to by counsel for the respective parties, just as if the same had been originally incorporated in said findings, signed and agreed to as aforesaid; and said parties hereby expressly waive any and all manner of objection to said supplemental finding or to any other matter or thing connected therewith.

Dated January 10, 1901.

FRANK L. COOMBS,
United States Attorney, for Plaintiff.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

Said supplemental finding of fact, as hereby agreed to, is as follows:

The title of the United States, as successor of the Mexican Republic, under the treaty of Guadalupe-Hidalgo, to the land in controversy, has not since been divested by patent or other conveyance, and the title thereto is still in the United States, unless the same passed to the State of California by virtue of the admission of the State under the act of Congress, or unless the United States relinquished title thereto under subsequent acts of Congress.

JAS. H. BEATTY, *Judge.*

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

28 In the circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), substituted for California Dry Dock Company (a corporation), defendant. } No. 12817.

Judgment on findings.

This cause came on regularly for trial upon the third day of August, 1900, being a day in the July, 1900, term of said court, before the court, sitting without a jury, a trial by jury having been duly waived by stipulation of the attorneys for the respective parties filed herein. Frank L. Coombs, esq., United States attorney, and Marshall B. Woodworth, esq., assistant United States attorney, appeared upon behalf of the plaintiff, and Charles Page, esq., appeared upon behalf of the defendant; and thereupon evidence, oral and documentary, upon behalf of the respective parties was introduced and closed, and the cause, after arguments of the
29 attorneys, was submitted to the court for consideration and decision. And the court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the court that the United States of America, plaintiff herein, have and recover of and from Mission Rock Company, a corporation, defendant herein, the possession of all that certain tract of land situate in the State and northern district of California, and described as follows, to wit:

Commencing at a point in the bay of San Francisco, State and northern district of California, distant 3,570 feet southeasterly from the southerly corner of Brannan and Second streets, said distance being measured along the extension, southeasterly of the southwesterly line of Second street; thence in a southwesterly direction at right angles with said line of Second street extended 500 feet; thence at right angles southeasterly 800 feet; thence at right angles northeasterly 800 feet; thence at right angles northwesterly 800 feet; thence at right angles southwesterly 300 feet to the point of commencement.

Said tract of land being a square including the rock known as Mission Rock and containing 14 69-100 acres, more or less, and being a
30 fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian.

And it is further considered and adjudged that said plaintiff recover from said defendant its costs in this behalf expended, taxed at $48.40.

Judgment entered January 23d, 1901.

SOUTHARD HOFFMAN, *Clerk.*

A true copy. Attest:
[SEAL.]

SOUTHARD HOFFMAN, *Clerk.*
By W. B. BEAIZLEY, *Deputy Clerk.*

(Endorsed.) Filed January 23, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

31 In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), DEFENDANT. } No. 12817.

Certificate to judgment roll.

I, Southard Hoffman, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certifythat the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said circuit court the 23d day of January, 1901.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk.*
By W. B. BEAIZLEY, *Deputy Clerk.*

(Endorsed:) Judgment roll. Filed January 23, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

32 In the circuit court of the United States, northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
CALIFORNIA DRY DOCK COMPANY, DEFENDANT. }

Opinion.

Frank L. Coombs, Un ted States attorney, and Marshall B. Woodworth, assistant United States attorney, for plaintiff. Page, McCutchen, Harding & Knight, for defendant.

What has long been known as "Mission Rock," situated in the bay of San Francisco, about one-half mile east of the shore of the land upon which the city of San Francisco is situated, consists of two islands of rocks projecting above high tide, having areas respectively of 14-100 and 1-100 acres. So far as known they have always been barren rocks with shores so steep that they are surrounded with very little land or rock that is uncovered by the tide. California's admission act of September 9, 1850, was similar in its provisions to those of the admission acts
33 of other States. Claiming the title through such admission act to the submerged lands surrounding these rocks, the State by its legislature, on April 4, 1870, authorized the sale of the same to one Tichenor, and he having complied with all the conditions prescribed, did on July 11, 1872, receive from the State a patent for a tract of eight hundred feet square, surrounding these rocks "containing 14-3500 acres, exclusive of said rocks." By mesne conveyances the defendant now has whatever title to the premises the State could convey. The defendant has by the deposit of rock and other material filled in the space surrounding these rocks to such extent that the area above water is now, as shown by a map introduced by defendant and marked Exhibit No. 1, 3

and 9-10 acres, including, as is understood, the area of the original islands or rocks. The plaintiff brings this action for the possession of all the area conveyed by the State, and also that of the islands, being a total of 14 and 69-100 acres.

The question is whether California had any title to what it attempted to convey. It can not be doubted that "tide lands" become upon the admission of a State its property. It is sufficient to refer to but one of the many adjudications. Illinois Central Railroad vs. Illinois, 146 U. S., 435, says: "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impair-
34 ment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States." If any of the area surrounding these rocks is within the term "tide lands," it is evident from the testimony that but a small portion thereof is. The line around these islands to which the low tide recedes is not clearly fixed by the evidence. The only witness examined on this question, aided by plaintiff's maps, Exhibits H and G, said there was originally "not very much" land around these rocks uncovered by the ebbing tide; that it "may vary from 10 to 25 feet, depending upon the steepness of the slope of the rock. That, however, is a mere estimate." Defendant's said Exhibit No. 1 has upon it an irregular line marked "Line of filling about level at low water," within which is included a total area of 3 and 9-100 acres, from which, deducting that of the islands, 15-100 acres, leaves 2 and 94-100 acres, which, admitting defendant's showing as correct, is the maximum area which the State could convey. The State did attempt to convey what under no theory of the law could be termed tide lands, but which it conveyed as submerged lands. If it could do so, no reason exists why it may not convey as submerged lands the entire bottom of San Francisco Bay.

Plaintiff claims that "tide lands" are only those adjoining the mainland on the sea, on bays, inlets, and arms of the sea, and that they do not include those lands surrounding islands, especially those in a bay. So far as my observation goes the Government has always acquired
35 and retained the islands in the bays of important seaports for fortification and other governmental purposes. If the State can hold as tide lands a strip around such islands the Government would be absolutely excluded from its island possessions except by paying tribute to the State or its grantees. The defendant's counsel says the Government may meet such an emergency through its power to control the navigable waters for commercial purposes, and that the purchaser of such tide or submerged lands "would take the title, subject always to the control of the United States, over the waters covering them." This would be a circuitous way by which to protect the public or Government interests as well as through the exercise of arbitrary power. That it may be done the authorities seem to justify, but the same authorities also hold that the State can claim title to convey such tide lands only "when that can be done without substantial impairment of the interest of the public—

of the Government—to surround the islands in a bay, which it needs, with an adverse title. Plaintiff has cited a number of authorities in support of its claim that tide lands do not pertain to the shores of islands such as these, but they are not decisive of the question, because it was not directly involved in any of the cases so far as I can observe.

As it has been held that tide lands can not be controlled by the State to the detriment of the public welfare; as the islands within the bay of an important seaport are of great value to the public and to the
36 Government, and as it is absolutely necessary that the approach to them must be unobstructed to make them available, the court should hesitate to allow the claim made by the defendant unless supported by some clear statutory or judicial authority; and in the absence of either that is satisfactory, it must be and is held that the lands surrounding these islands were not within the denomination of tide lands, and that the State had no title thereto to convey.

The act of Congress approved July 1, 1864 (13 Stat., 332), by the fifth section, provided for the relinquishment to San Francisco of all lands within its limits, but it accepted from the operation of such relinquishment such lands as may be designated by the President within one year after the rendition to the General Land Office by the surveyor-general of an approved plat of the exclusive limits of San Francisco. No such plat has yet been sent to the General Land Office, but the President did, on January 13, 1889, designate these islands as permanently reserved for naval purposes, thereby preserving to the Government the reservation of its rights provided by the statute.

As the very great importance of this case will lead to its final determination by higher courts, it is deemed unnecessary to enter largely into the discussion of the questions involved, and without further suggestion I content myself with the statement of my conclusion in favor of
37 judgment of possession for the plaintiff, which is accordingly ordered.

Dated this 11th day of December 1900.

BEATTY, *Judge.*

(Endorsed:) Filed December 14, 1900. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the United States circuit court, in and for the ninth circuit and northern district of California.

THE UNITED STATES, PLAINTIFF,
vs.
MISSION ROCK COMPANY, SUBSTITUTED IN PLACE of California Dry Dock Company, defendant.

Bill of exceptions.

Be it remembered that on the signing by the court of the findings in the above-entitled cause and the order of judgment therein in favor of the plaintiff, the defendant, by its attorneys, duly assented to the facts of the cause as found by the court and filed herein as its finding, but excepted

to the ruling of the court thereon declaring and deciding that judg
38 ment thereon should be entered in favor of defendant as requeste
by it. And whereas the said exception does not otherwise appea
of record, I have hereunto set my hand and seal this 2d day of January
1901.

JAS. H. BEATTY.

We hereby agree to the correctness of the foregoing bill of exceptions.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Defendant.

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk. B
W. B. Beaizley, deputy clerk.

In the United States circuit court, in and for the ninth circuit, northern
district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), DEFENDANT.

Petition for writ of error.

Mission Rock Company, defendant in the above-entitled action
39 feeling itself aggrieved by the decision and judgment of this hon
orable court entered in this cause on the 23d day of January, A. D
1901, does, through and by its attorneys, Page, McCutchen, Harding &
Knight, respectfully petition and pray this court for the allowance of
writ of error from said decision and judgment to the United State
circuit court of appeals in and for the ninth judicial circuit, under an
according to the laws of the United States in that behalf made and pro
vided; and also that an order may be made fixing the amount of securit
and bond which defendant should give and furnish upon said writ o
error, and that upon the giving of said security and bond which defend
ant should give and furnish upon said writ of error, and that upon th
giving of said security and bond all further proceedings in this court b
suspended and stayed until the determination of said writ of error b
said circuit court of appeals in and for the ninth judicial circuit, an
prays that a transcript and record of the proceedings in the cause, dul
authenticated, may be transmitted to said circuit court of appeals.

Your petitioner and appellant herewith presents and files with th
clerk of the honorable court its assignment of errors.

PAGE, MCCUTCHEN, HARDING & KNIGHT,
Attorneys for Petitioner and Appellant.

40 *Order allowing writ of error.*

It is ordered that the prayer of said petitioner be allowed and th
said writ of error issue as prayed for.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk. B
W. B. Beaizley, deputy clerk.

In the circuit court of the United States for the ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY, DEFENDANT.

Assignment of errors.

Now comes the defendant, Mission Rock Company, and files its assignment of errors in the above-entitled cause as follows, to wit:

1. That the circuit court erred in its decision and judgment that, upon the findings of fact made by it, the plaintiff was entitled to judgment against the defendant for the recovery of the premises described in the complaint.

41 2. That the circuit court erred in its decision and judgment that, upon the findings of fact made by it, the defendant was not entitled to judgment against the plaintiff.

3. That the circuit court erred in deciding that the title to that portion of the lands described in the complaint which was constantly covered by the tidal waters of the bay of San Francisco remained and was, after the admission of the State into the Union, in the United States and did not vest in the State of California.

4. That the circuit court erred in deciding that that portion of the lands described in the complaint and which are shown by the findings to have been and to be above the line of ordinary high-water mark, were and are lands the title whereof was and remained, after the admission of the State of California into the Union, in the United States and not in the State of California.

5. That the circuit court erred in its decision and judgment holding and adjudging that the title to that portion of the lands described in the complaint which were constantly submerged by the tidal waters of the bay of San Francisco did not vest in the State of California on admission of the State into the Union.

6. That the circuit court erred in its decision and judgment holding and adjudging that the title to that portion of the lands described in the complaint which by the findings and evidence was shown to lie above the line of ordinary high tide, did not, on the admission of the State of California into the Union, vest in the said State.

42 7. That the circuit court erred in its decision and judgment holding and adjudging that under the act of July 1, 1864 (13 Stat., 332) relinquishing to the city of San Francisco the lands described in said act, the United States excepted from such relinquishment the lands described in the complaint or any portion thereof.

8. That the circuit court erred in holding and adjudging that it was within the power of the President under the said act to designate the said lands, or any part of them, as excepted from the relinquishment made in said act.

9. That the circuit court erred in holding and adjudging that the title to the said lands described in the complaint did not vest under said act in the city of San Francisco.

10. That the circuit court erred in deciding and holding that after relinquishment of the title to said lands by the United States by said

act, the title conveyed by said act was divested by the act of the President referred to in the findings.

11. That the circuit court erred in deciding and holding that the executive order of the President excepted from the grant to San Francisco more than the specific acreage of the lands sued for lying above high-water mark stated in the said order.

12. That the circuit court erred in deciding and holding that all of said lands in the complaint described were not part of the lands covered by navigable waters of the State of California.

13. That the circuit court erred in deciding and holding that
43 the said lands described as lying above high-water mark were lands which did not vest in the State on her admission into the Union.

14. That the circuit court erred in deciding and holding that an action of ejectment would lie for the recovery of lands the title to which had been fully relinquished by the United States in 1864 in favor of the city of San Francisco, subject to a right of subsequent reservation by the President.

15. That the circuit court erred in holding and deciding that the reservation in the said act of 1864 was not void, and that by the act of the President, nearly forty years later, reserving said lands, the title thereto again became vested in the United States.

PAGE, MCCUTCHEN, HARDING AND KNIGHT,
Attorneys for Defendant.

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

44 In the United States circuit court in and for the ninth circuit northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), defendant.

Order staying proceedings.

The defendant, Mission Rock Company, having this day filed its petition for a writ of error from the decision and judgment of this court entered herein, to the United States circuit court of appeals in and for the ninth judicial circuit, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States circuit court of appeals in and for the ninth judicial circuit, and said petition having this day been allowed:

Now, therefore, it is ordered that upon the said defendant, Mission Rock Company, filing with the clerk of this court a good and
45 sufficient bond in the sum of twenty-five thousand dollars, said bond to be approved by the court, that all further proceedings in

this court be, and they are hereby, suspended and stayed until the determination of said writ of error by said United States circuit court of appeals.

Dated January 23, 1901.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed January 23, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

Supersedeas and cost bond on writ of error.

Know all men by these presents that Mission Rock Company, a corporation, as principal, and Pacific Surety Company, a corporation, as surety, are held and firmly bound unto the United States of America in the full and just sum of twenty-five thousand dollars, to be paid to the said the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, in the year of our Lord one thousand nine hundred and one.

Whereas lately in the circuit court of the United States in and for the ninth circuit, northern district of California, in a suit pending in said court between the United States of America, plaintiff, and Mission
46 Rock Company, a corporation, defendant, judgment was rendered and entered on the 23d day of January, A. D. 1901, against the said defendant Mission Rock Company, a corporation, and in favor of said plaintiff, and the said defendant, Mission Rock Company, a corporation, having obtained from the same court its writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the above-named plaintiff, citing and admonishing it to appear at the United States circuit court of appeals for the ninth circuit, to be holden at San Francisco, in the State of California:

Now, the condition of the above obligation is such that if the said Mission Rock Company, a corporation, defendant (plaintiff in error), shall prosecute the said writ to effect, and answer all damages and costs, and all sums of money that may be recovered for the use and detention of the property and the costs of suit and just damages for delay, if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[Corporate seal of Mission Rock Company.]

MISSION ROCK COMPANY,
By WM. BABCOCK,
President.

W. F. RUSSELL,
Secretary.

[Corporate seal of Pacific Surety Company.]

PACIFIC SURETY COMPANY,
By WALLACE EVERSON,
President.

A. P. REDDING,
Secretary.

[Internal revenue stamps to the amount of 62½c. attached and canceled.]

47 UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

Personally appeared before me, A. P. Redding, on this thirtieth day of January, one thousand nine hundred and one, known to me to be the secretary of the Pacific Surety Company, the corporation described in and which executed the annexed bond of Mission Rock Company, defendant, as surety thereon, and who, being by me duly sworn, deposes and says: That he resides at Menlo Park, in the State of California; that he is the secretary of the said Pacific Surety Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of California; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Mission Rock Company, defendant, is the corporate seal of the said Pacific Surety Company, and was thereto affixed by order and authority of the board of directors of said company; that he signed his name thereto by like order and authority as secretary of said company; that he is acquainted with Wallace Everson and knows him to be the president of said company; that the signature of said Wallace Everson subscribed to said bond is in the genuine handwriting of said Wallace Everson, and was thereto subscribed
48 by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities of every nature whatsoever by more than the sum of two hundred and fifty thousand dollars ($250,000.00).

[Corporate seal of Pacific Surety Company.] A. P. REDDING.

Sworn to, acknowledged before me, and subscribed in my presence this 30th day of January, 1901.

[NOTARIAL SEAL.] O. A. EGGERS,
Notary Public in and for the City and County of San Francisco, State of California.

Whereas the Pacific Surety Company, a corporation duly incorporated under the laws of the State of California, has deposited with me its charter or articles of incoporation and the statement required by section 3 of an act of Congress approved August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act; that it has a paid-up capital of not less than $250,000 in cash or its it equivalent, and that it is able to keep and perform its contracts:

Now, therefore, the said Pacific Surety Company is hereby granted authority to do business under said act in the said State of California, and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in
49 which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

[SEAL.] JOHN W. GRIGGS,
Attorney-General.

DEPARTMENT OF JUSTICE, WASHINGTON, D. C.,
November 25, 1898.

DEPARTMENT OF JUSTICE,
Washington, D. C., April 18, 1900.

[10 c. int. rev. stamp hereto attached and canceled.]
The annexed is a true copy of an original authorization to do business, issued by the Attorney-General under the act of Congress approved August 13, 1894.

Witness my hand and seal of the Department.

[Seal of Department of Justice.]

CECIL CLAY,
Chief Clerk.

(Endorsed:) The form of the within bond and the sufficiency of the surety approved this 30th day of January, 1901.

WM. W. MORROW, *Judge.*

Filed January 30, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

50 In the circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MISSION ROCK COMPANY (A CORPORATION), substituted for California Dry Dock Company, defendant. } No. 12817.

Clerks certificate to record.

I, Southard Hoffman, clerk of the circuit court of the United States, ninth judicial circuit, northern district of California, do hereby certify the foregoing forty-six (46) written pages, numbered from 1 to 46 inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $28.00, and that said amount was paid by the attorneys for the defendant above named.

51 In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 6th day of February, A. D. 1901.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Ten cent U. S. int. rev. stamp, canceled.]

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the ninth circuit, northern district of California, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some

of you, between Mission Rock Company, a corporation, defendant and plaintiff in error, and United States of America, plaintiff and defendant in error, a manifest error has happened to the great damage of the said Mission Rock Company, a corporation, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in
52 this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 12th day of February next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of January, in the year of our Lord one thousand nine hundred and one.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

Allowed by:

WM. W. MORROW, *Judge.*

Service of within writ and receipt of a copy thereof is hereby admitted this 30th day of January, A. D. 1901.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Defendant in Error.

53 The answer of the judges of the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the United States circuit court of appeals for the ninth circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.

SOUTHARD HOFFMAN, *Clerk.*

(Endorsed:) No. 12817. Circuit court of the United States, ninth circuit, northern district of California. Mission Rock Company (a corporation), plaintiff in error, vs. United States of America, defendant in error. Writ of error. Filed January 30, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

54 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 12th day of February next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, ninth circuit, northern district of California, in a certain action numbered 12817, wherein Mission Rock Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William W. Morrow, judge of the United States circuit court, ninth circuit, northern district of California, this 30th day of January, A. D. 1901.

WM. W. MORROW, *Judge.*

Service of within citation and receipt of a copy thereof is hereby admitted this 30th day of January, 1901.

FRANK L. COOMBS and
MARSHALL B. WOODWORTH,
Attorneys for Defendant in Error.

55 (Endorsed:) No. 12817. Circuit court of the United States, ninth circuit, northern district of California. Mission Rock Company (a corporation), plaintiff in error, vs. The United States of America, defendant in error. Citation. Filed January 30, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

(Endorsed:) No. 682. In the United States circuit court of appeals for the ninth circuit. Mission Rock Company (a corporation), plaintiff in error, vs. The United States of America, defendant in error. Transcript of record. In error to the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California. Filed February 6, A. D. 1901.

F. D. MONCKTON, *Clerk.*

56 In the United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY (A CORPORATION), PLAINTIFF in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 682.

In error to the circuit court of the United States for the northern district of California.

Before Gilbert, Ross, and Morrow, circuit judges.

Ross, circuit judge, delivered the opinion of the court:

This was an action of ejectment originally brought by the United States against the California Dry Dock Company, a corporation, for the recovery

of the possession of a tract of land containing fourteen and sixty-nine one-hundredths acres, and including the rock known as Mission Rock and a small adjacent rock in the Bay of San Francisco, together with damages for the withholding of the premises, and rents, issues, and profits thereof, aggregating $355,000. The defendant Mission Rock Company, a California corporation, having, pending the action, acquired all the right, title, and interest of the California Dry Dock Company in the premises sued for, was by an order of the court, based upon the request of the respective parties, substituted for the original defendant and the action continued against it. The case comes before us upon the
57 judgment roll and upon findings of fact which appear to have been agreed to by the respective parties. From those findings it appears that the title of the United States to the lands in controversy under the treaty of Guadalupe Hidalgo, as successor of the Mexican Republic, has not since been divested by patent or other conveyance, and that the title thereto is still in the United States, unless the same passed to the State of California by virtue of the admission of that State into the Union under the act of Congress of September 9, 1850, or unless the United States relinquished its title thereto under subsequent acts of Congress. At the time of the admission of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than twenty and less than forty feet above such high water, and of other lands contiguous thereto and surrounding the rocks or islands, which were completely submerged, and over which the daily tides continuously flowed and ebbed. The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State into the Union were as follows: The one called Mission Rock had an area of fourteen one-hundredths of an acre, the other an area of one one-hundredth of an acre. These rocks or islands rose abruptly out of the bay. Their sides, to the extent that they were covered and uncovered by the flow and ebb of the tide, varied from ten to twenty-five feet, depending on their steepness. Both rocks were barren, without soil or water, and were of no value for agricultural or mining purposes. They lay at a distance of about half a mile from the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable waters divided and still
58 divide the lands sued for from the mainland, and surrounded and now surround them, and they were not at the date of the admission of California into the Union within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican Governments. No approved plat of the exterior limits of the city of San Francisco, as provided by the terms of section 5 of the act of Congress of July 1, 1864 (13 Stats., 332), has been filed or rendered to the General Land Office of the United States or of the State of California. The lands sued for are within such exterior limits. On the 13th day of January, 1899, the President of the United States, purporting to act in conformity with that act of Congress, issued the following order:

"EXECUTIVE MANSION, *January 13, 1899.*

"It is hereby ordered that Mission Island and the small islands southeast thereof, designated on the official plat on file in the General Land

Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

"WILLIAM MCKINLEY."

On the day of March, 1864, the United States surveyor-general for the State of California extended the public surveys so as to comprehend and include the rocks or islands and the lands in controversy. On April 4, 1870, the governor of the State of California approved an act of the legislature of the State entitled "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor" (Stats. 1870, 1871), which lands therein described included the lands sued for in this action. On
59 the 11th day of July, 1872, the State of California, in conformity with the act of April 4, 1870, issued its patent for the lands in controversy herein to Tichenor, purporting to convey the same to him, which patent was duly recorded. After the execution of the patent Tichenor executed a deed of grant, bargain, and sale, of date May 1, 1878, purporting to convey the lands in controversy to the California Dry Dock Company, which thereafter, and on the 6th day of June, 1900, executed to the defendant Mission Rock Company a like deed to the same lands, which still holds whatever rights it thereby acquired, and into the possession of which lands the Mission Rock Company then entered and has ever since remained. After the execution of the deed by Tichenor to the California Dry Dock Company that company undertook the improvement of the lands covered by the deed by filling in portions of the submerged lands immediately around and contiguous to the rocks or islands with many thousands of tons of rock, thus increasing the available area of the lands to about four acres, upon which extensive warehouses were built by it and wharves erected for the accommodation of shipping. Ever since the issuance of the patent by the State of California to Tichenor, the patentee and those holding under him have been in the continuous and uninterrupted possession of the lands covered by the patent, using the same and the improvement thereon for commercial purposes, and claiming to be the absolute owner thereof. On the 7th day of April, 1890, Colonel George H. Mendell, then in charge of the corps of engineers of the United States Army on the Pacific coast, caused to be served on the California Dry Dock Company the following notice:

60 "UNITED STATES ENGINEER'S OFFICE,
"No. 533 KEARNY STREET,
"*San Francisco, Cal., April 7th, 1890.*

"Captain OLIVER ELDRIDGE,
"*President California Dry Dock Company,*
"*303 California Street, San Francisco, Cal.*

"SIR: Under the provisions of section 12 of the river and harbor act of August 11th, 1888 (a copy of which is enclosed), a board of engineer officers was appointed to establish the harbor line of San Francisco Harbor and adjacent waters. There is transmitted herewith for your

information a map upon which are shown the limiting lines of wharves and the line beyond which no deposits shall hereafter be made, at Mission Rock, as established by the board and approved by the Secretary of War March 24th, 1890.

"Very respectfully,

G. H. MENDELL,
"*Colonel, Corps of Engineers.*"

The limits referred to in this letter and delineated in the map are, in effect, the limits of Mission Rock as approved at that time.

Upon the facts so found and agreed to by the respective parties the court below gave the Government judgment for the possession of the premises sued for, with costs, but without any damages, rents, issues, or profits. The appeal is from that judgment.

From the foregoing statement of the case it will be seen that the judgment is not limited to the two rocks or islands embraced in the Executive order of January 13, 1899, the one covering fourteen one-hundredths and the other one one-hundredth of an acre, but awards the Government the entire tract of fourteen and sixty-nine one-hundredths acres,
61 including the warehouses and other improvements constructed by the defendant and its predecessors in interest. The case therefore involves not only legal questions of great importance, but also property rights of great value.

As no part of the property in controversy ever was within any private or pueblo grant, the title to the whole tract in question passed to the United States as the successor of the Republic of Mexico. The questions are, Has the title to the whole or any part of the premises passed out of the United States, and if so, subject to what, if any, conditions?

The act of Congress of September 9, 1850, admitting California into the Union "on an equal footing with the original States in all respects whatever," was subject to the "express condition that the people of said State shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and in no case shall nonresident proprietors, who are citizens of the United States, be taxed higher than residents; and that all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor: Provided, That nothing herein contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as articles of compact in the ordinance adopted by the convention which formed the constitution of that State." Substantially the same language was used by Congress in the admission of each of the new States. There
62 is, therefore, and can be, as said by the Supreme Court in Illinois Central Railroad *v.* Illinois, 146 U. S., 387, 434, "no distinction between the several States of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits." In that case the court further declared it to be the settled law of this country "that the ownership of and dominion and sovereignty over lands covered by

tide waters within the limits of the several States belonged to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States." And speaking with direct reference to the title to the soil under the tide waters of the bay of San Francisco, the same court held in The Weber *v.* Harbor Commissioners, 18 Wall., 57, 65, that although such title was acquired by the United States by the cession from Mexico, equally with the title to uplands, they held it only in trust for the future State. "Upon the admission of California into the Union upon an equal footing with the original States," said the court, "absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation of the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General Government."

63 It does not remain open to question, therefore, that the State of California acquired, by the act of Congress of September 9, 1850, title to the soil under the tide waters of the bay of San Francisco, subject to the paramount right of navigation over the waters, so far as the same may be required by the necessities of commerce with foreign nations or among the several States, the regulation of which remains vested in the United States. In view of the decision of the Supreme Court in the case of Illinois Central Railroad Company *v.* Illinois, *supra*, the right of the State to dispose of such lands, however, does not seem to be as broad as it was declared to be in the case of Webber *v.* Harbor Commissioners; for in Illinois Central Railroad Company *v.* Illinois the court, in speaking of the title of the State of Illinois to the lands under the navigable waters of Lake Michigan, said: "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the creation of wharves, docks, and piers therein, for

64 which purpose the State may grant parcels of the submerged lands, and so long as their disposition is made for such purpose no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce and grants

of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State; but that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interest of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language, sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands
65 under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they can not be placed entirely beyond the direction and control of the State. * * * Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the
66 right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every har-

bor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated."

Under the rule declared in the case last cited there can be no valid objection to the grant by the State of a comparatively small part of the submerged lands of the bay, made, as was the grant to Tichenor under whom the defendant company claims, in aid, to some extent, of commerce, so long at least as the grant is unquestioned by the State and the improvements are made under and subject to the control of the United States, which is the case before us; for the act of California providing for the sale and conveyance to Tichenor of the submerged lands in controversy, and for which the State's patent was thereby authorized, expressly provided that "such patent shall not be issued until said Tichenor, his heirs or assigns, shall have constructed a marine railway or dry dock at said Mission Rock" (Cal. Stat., 1869, 1870, p. 801), and the findings of the court below show that the United States Engineer Department prescribed the line beyond which the defendant company and its predecessors in interest were precluded from filling in the submerged land covered by the grant from the State. A large and valuable part of the city of San Francisco, extending from the present water front to, in some places, Montgomery street, was at the time of and subsequent to the admission of California into the Union a part of the submerged lands of the bay, but has since been filled in by the many hundred grantors under the city and State, who have erected buildings and improvements thereon at costs running into many millions of dollars. All of this was done in aid of commerce, in the upbuilding of a great city upon the bay, and with the encouragement and consent
67 of the General Government. Under such circumstances we regard it as very clear that no court would be justified in holding titles thus secured invalid. Upon the facts appearing, we are of the opinion that the United States is not entitled to recover from the defendant any of the submerged land included in the grant from the State of California to the predecessor in interest of the defendant. We are further of opinion, however, that that grant did not include the two rocks or islands above mentioned, for the reason that neither of them ever passed to the State. They no more constituted submerged land than did the island of Alcatraz, also situated in the bay of San Francisco, upon which the Government has erected and now maintains important fortifications. That island, it is true, is much larger than the larger of the two islands or rocks here in controversy, the island of Alcatraz being about six hundred yards long by about two hundred and sixty yards in breadth, and rising to an elevation of one hundred and thirty-seven feet above the bay. Like the two islands in controversy, however, it is composed almost entirely of rock. (Pacific Coast Pilot, 182.) The relative size, however, of the rocks or islands does not change their legal character. Neither of them is submerged and all alike project above the surface of the bay, and do not and never did constitute any part of the submerged or tide lands which passed to the State. The title acquired by the United States to the rocks and islands in question as successor of the Mexican Republic was not relinquished by the provisions of section 5 of the act of Congress of July 1, 1864 (13 Stats. at Large, 332), which reads as follows:

"SEC. 5. And be it further enacted, That all the right and title of the

United States to the lands within the corporate limits of the city
68 of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the 15th of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city,' there being excepted from this relinquishment and grant all sites or other parcels of land which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office by the surveyor-general of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys: And provided, That the relinquishment and grant by this act shall in no manner interfere with or prejudice any bona fide claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

The act of July 1, 1864, was in aid and furtherance of the act of Congress of March 3, 1851 (9 Stats. at Large, 631), the purpose of which was, as its title declared, the ascertainment and settlement of private land claims in California. To the board of land commissioners created by that act the city of San Francisco, which had been incorporated in April, 1850, as a city by the State government, presented its claim to four square leagues of land as the successor of the Mex-
69 ican pueblo. Those proceedings resulted in a decree of the circuit court of the United States for the district of California, entered on the 18th of May, 1858, confirming the claim of the city to a tract of land embracing so much of the upper portion of the peninsula which is situated above ordinary high-water mark of 1846 as would contain an area of four square leagues, the tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area designated, subject to certain deductions which it is unnecessary to mention. The confirmation was to San Francisco in trust for the benefit of lot holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue in trust for the benefit of the inhabitants of the city. (San Francisco v. Le Roy, 138 U. S., 656, 665.) Pending those proceedings for the confirmation of the city's claim, to wit, April 15, 1851, its charter of 1850 was repealed and a new charter adopted (Cal. Stats., 1851, 357), and on the 20th day of June, 1855, what is generally known as the Van Ness ordinance was adopted by the city of San Francisco, by which the city relinquished and granted all its right and claim to the land within its corporate limits as defined by its charter of 1851, with certain exceptions, to parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the

time of the introduction of the ordinance into the common council or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; and it declared that for the purposes contemplated by the ordinance persons should be deemed possessors who held
70 titles to land within those limits by virtue of a grant made by any ayuntamiento, town council, alcalde, or justice of the peace of the former pueblo before the 7th of July, 1846, or by virtue of a grant subsequently made by the authorities, within certain limits of the city, previous to its incorporation by the State, provided the grant, or a material portion of it, had been recorded in a proper book of records in the control of the recorder of the county previous to April 3, 1851. The city, among other things, reserved from the grant all the lots which it then occupied or had set apart for public squares, streets, and sites for schoolhouses, city hall, and other buildings belonging to the corporation. In March, 1858, the legislature of the State of California ratified and confirmed that ordinance (Stats. of Cal., 1858, page 52), and by the fifth section of the act of Congress of June 1, 1864, above quoted, the right and title of the United States to the lands claimed within the corporate limits of the charter of 1851 were relinquished and granted to the city and its successors for the uses and purposes specified in the Van Ness ordinance. Those uses and purposes, as will readily be seen from the foregoing statement of them, had no relation whatever to the rocks or islands here in controversy, which were and are far outside of the pueblo grant of lands claimed by and confirmed to the city.

From the views above expressed it results that the judgment must be, and hereby is, reversed, and the cause must be, and hereby is, remanded to the court below with instructions to enter judgment for the plaintiff for the recovery of the possession of the two islands or rocks mentioned in the record, containing, respectively, fourteen one-hundredths of an acre and one one-hundredth of an acre, and designated on the offi-
71 cial plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California; and as respects the remainder of the land sued for, that the plaintiff take nothing.

(Endorsed:) Opinion. Filed May 16, 1901. F. D. Monckton, clerk.

72 United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY, A CORPORATION, plaintiff in error, v. THE UNITED STATES OF AMERICA, DEFENDANT in error.	No. 682. Judgment.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and

the same is hereby, reversed, and the cause remanded to the court below with instructions to enter judgment for the plaintiff for the recovery of the possession of the two islands or rocks mentioned in the record, containing, respectively, fourteen one-hundredths of an acre and one one-hundredth of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, and as respects the remainder of the land sued for that the plaintiff take nothing.

(Endorsed:) Judgment. Filed and entered May 16, 1901. F. D. Monckton, clerk.

73 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, plaintiff in error,
vs.
MISSION ROCK COMPANY (CORPORATION), defendant in error.

Petition for a writ of error.

The United States of America, plaintiff in error in the above-entitled action, feeling itself aggrieved by the decision and judgment of the United States circuit court of appeals, ninth circuit, entered in this cause on the sixteenth day of May, in the year of our Lord one thousand nine hundred and one, does, through and by its attorney, Marshall B. Woodworth, United States attorney in and for the northern district of California, respectfully petition and pray this honorable court for the allowance of a writ of error from said decision and judgment of the circuit court of appeals, ninth circuit, to this court, under and according to the laws of the United States in that behalf made and performed, and that, pending all further proceedings in this court, the decision and judgment of the United States circuit court of appeals, ninth district, be suspended and stayed until the determination of said writ of error by this court; said plaintiff in error prays that a transcript and record of the proceedings in the cause, duly authenticated, may be transmitted to this court from the said United States circuit court of appeals, ninth circuit.

74 Your petitioner and plaintiff in error herewith presents its assignment of errors.

MARSHALL B. WOODWORTH,
United States Attorney in and for the Northern District of California, for Petitioner and Plaintiff in Error.

Order allowing writ of error.

It is hereby ordered that the prayer of said petitioner be allowed, and that said writ of error issue as prayed for.

JOSEPH MCKENNA,
Associate Justice, Supreme Court of the United States.

(Endorsed:) Petition for writ of error and order allowing writ of error.

Service of the within petition for writ of error by copy admitted this 6th day of November, 1901. Page, McCutchen, Harding, and Knight, C. P. attorneys for deft. in error.

No. 682 in U. S. circuit court of appeals for the ninth circuit.

Filed November 6, 1901. F. D. Monckton, clerk.

75 In the United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY (A CORPORATION), plaintiff in error, *vs.* THE UNITED STATES OF AMERICA, DEFENDANT in error. } No. 682.

Assignment of errors.

Now comes the defendant in error, the United States of America, and files its assignment of errors in the above-entitled case, as follows, to wit:

I.

That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment that the United States was entitled to judgment for the recovery of the possession of the two islands or rocks mentioned in the findings of fact, containing, respectively, .14 of an acre and .01 of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2, section 11, township 2 south, range 5 west, M. D. M., California, and, as respects the remainder of the land sued for, that the United States take nothing.

II.

76 That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment that, upon the findings of fact and conclusions of law, the Mission Rock Company was entitled to judgment against the United States for all of the premises described in the complaint, excepting those portions containing, respectively, .14 of an acre and .01 of an acre, and designated on the official plat in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California.

III.

That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment that, upon the findings of fact and conclusions of law, the United States was not entitled to judgment against the Mission Rock Company for all of the lands described in the complaint, excepting as to those portions containing, respectively, .14 of an acre and .01 of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California.

IV.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the title to that portion of the lands described in the complaint, which was constantly covered by the tidal waters of the bay of San Francisco, remained and was, after the admission of the State of California into the Union, in the State of California, and did not remain and vest in the United States.

V.

77 That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that that portion of the lands described in the complaint, and which is shown by the findings of fact to have been, and to be, below the line of ordinary high-water mark was and is land, the title whereof was and remained after the admission of the State of California into the Union, in the State of California and not in the United States.

VI.

That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment, holding and adjudging that the title to that portion of the lands described in the complaint which was constantly submerged by the tidal waters of the bay of San Francisco did vest in the State of California on the admission of the State into the Union, and that the Mission Rock Company, the grantee, by mesne conveyances, as shown by the findings of fact, became vested with the title to said lands.

VII.

That the United States circuit court of appeals for the ninth circuit erred in its decision and judgment, holding and adjudging that the title to that portion of the lands described in the complaint, which by the findings of fact was shown to lie below the line of ordinary high-water mark, vested in the State of California on the admission of the said State into the Union.

VIII.

78 That the United States circuit court of appeals for the ninth circuit erred in holding and adjudging that the Executive order issued on the 13th day of January, 1899, by the President of the United States, ordering that Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California, be declared as permanently reserved for naval purposes, comprehended, respectively, .14 of an acre and .01 of an acre, instead of all of the lands described in the complaint.

IX.

That the United States circuit court of appeals for the ninth circuit erred in holding and adjudging that the executive order issued on the 13th

day of January, 1899, by the President of the United States, ordering that Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California, be declared to be permanently reserved for naval purposes, did not comprehend and embrace all of the land described in the complaint, containing 14.69 acres.

X.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the executive order issued on the 13th day of January, 1899, by the President of the United States, ordering that Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west,
M. D. M., California, be declared to be permanently reserved for
79 naval purposes, did not except more than .14 of an acre and .01
of an acre, respectively, lying above ordinary high-water mark, from the specific acreage of the land sued for.

XI.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that all of the said lands in the complaint described, excepting those portions containing, respectively, .14 of an acre and .01 of an acre, lying above the line of ordinary high-water mark, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2, section 11, township 2 south, range 5 west, M. D. M., California, were not part of the lands belonging to the United States.

XII.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the said lands described in the complaint as lying below ordinary high-water mark were lands in which the title did not remain in the United States, but vested in the State of California on her admission into the Union.

XIII.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the State of California had a right to grant a comparatively small part of the submerged lands of the bay of San Francisco to subserve the purposes of commerce and navigation, or commerce or navigation, or for any purpose whatsoever.

80 XIV.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the State of California had a right to grant any portion of the lands described in the complaint to subserve the purposes of commerce and navigation, or commerce, or navigation, or for any purpose whatsoever.

XV.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the marine railway or dry dock constructed at Mission Rock by one Tichenor was such a purpose, subserving the rights of commerce and navigation, or any right or purpose of commerce and navigation, as to authorize and render legal and valid the act of April 4, 1870, of the legislature of the State of California (Stats. of Cal., 1869–70, p. 801), providing for the sale and conveyance to one Tichenor of the lands described in said complaint, and authorizing the issuance of the patent of the State of California therefor, and which, according to the findings of fact, thereafter issued in accordance with said act of the legislature, upon the express provisions that said Tichenor, his heirs or assigns, should construct a marine railway or dry dock at said Mission Rock, according to the findings of fact, was done.

XVI.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the act of April 4, 1870, of the legislature of the State of California (Stats. of Cal., 1869–70, p. 801),
81 providing for the sale and conveyance to one Tichenor of the lands described in said complaint, and for which the State's patent was thereby authorized, and which, according to the findings of fact thereafter issued, upon the express provision that said Tichenor, his heirs or assigns, should construct a marine railway or dry dock at Mission Rock, which, according to the findings of fact, was done, was valid, and constituted a valid grant by the State of the lands described in said act and in said complaint, excepting those portions containing, respectively, .14 of an acre and .01 of an acre, the same being, respectively, above the line of ordinary high-water mark, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California.

XVII.

That the United States circuit court of appeals for the ninth circuit erred in deciding and holding that the United States was not entitled to all of the accretions mentioned in the findings of fact (Finding No. IX) attached to and surrounding those portions of land comprehended in the complaint, and held by it to belong to the United States, to wit, containing, respectively, .14 of an acre and .01 of an acre, and lying above the line of ordinary high-water mark, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California.

XVIII.

That the United States circuit court of appeals, for the ninth circ-
82 cuit, erred in deciding and holding that the United States was only entitled to those portions of the lands described in the complaint, containing, respectively, .14 of an acre and .01 of an acre, lying above the line of ordinary high-water mark, and designated on the offi-

cial plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, M. D. M., California, and was not also entitled to, and did not own, all of the accretions mentioned in the findings of fact (Finding No. IX), attached to and surrounding said lands above described, with all of the improvements thereon.

XIX.

That the court erred in deciding and holding that the United States, as the owner of Mission Rock, and the adjacent rock, did not own and be entitled to the recovery and possession, as such owner, of the artificial accretions, containing about four acres, made upon the lands theretofore submerged and covered by the waters of the bay of San Francisco immediately surrounding said rocks, which accretions had become a part of said rocks.

XX.

The court erred in deciding and holding that the United States did not have such a paramount sovereignty in its ownership as to preclude the right of the State of California, or its assigns, from filling in around said rock by accretions, artificial, to the entire deprivation and destruction of the rights of said United States, and to its property in said rocks.

XXI.

83 The court errred in deciding and holding that the United States, as the littoral owner of said islands, did not own the accretions made thereto; and as a riparian owner did not own and have the right to the possession of said accretions.

XXII.

The court erred in deciding and holding that the United States, as the riparian owner, did not have the right of property in and to the lands submerged, immediately surrounding its said islands, and did not own the same after said lands were filled in as aforesaid.

XXIII.

The court erred in deciding and holding that the United States did not have such a sovereignty in its titles to its lands, and to the particular islands in dispute, as to prevent the State of California from doing and performing any act whereby such sovereignty would be destroyed, and to shut off the United States in the exercise of its sovereignty from the navigable waters, and to shut off the United States from all communication with said waters.

XXIV.

The court erred in deciding and holding that the State could and did grant such a title in its submerged lands as to permit its grantee to fill in said lands above high-water mark, when the same surrounded the islands of the United States, or when the same was not adjacent to the shore.

XXV.

The court erred in deciding and holding that the State of California could grant such a title in its submerged lands as to permit its
84 grantee to fill in the same above high-water mark, when the said grantee was and is not the littoral owner or riparian owner.

XXVI.

The court erred in deciding and holding that the State of California could, in 1870, grant a fee in its submerged lands, in contravention of the acts of the legislature, as follows: The act of May 13, 1861 (Stats. of Cal., 1861, p. 335); the act of May 14, 1861 (State of Cal., p. 363); the act of April 27, 1863 (Stats. of Cal., 1863, sections 30 and 31, pp. 591, 601).

XXVII.

The court erred in deciding and holding that the act of the legislature of the State of California of April 4, 1870, heretofore referred to, and the patent following the same to the said Tichenor, was a conveyance in fee, or was more than a license to use said lands for the purpose of a marine railway to be built upon the said islands of the Government, to be used for commerce and navigation, and so as not to interfere with the rights of the United States.

XXVIII.

The court erred in deciding and holding that the acts of the assignees of the State of California, in filling in the submerged lands aforesaid, was not a trespass, and an unlawful act, the consequence of which would result to the title in the said islands, and the benefit, if any, would inure to said title in said islands.

XXIX.

The court erred in deciding and holding that the act of the Gov-
85 ernment engineers, in defining the line beyond which such filling could not be made, gave any rights or title to the assignees of the State of California, or any permission by which they might acquire such rights.

MARSHALL B. WOODWORTH.
United States Attorney.

(Endorsed:) Assignment of errors.

Service of the within assignment of errors by copy admitted this 6th day of November, 1901. Page, McCutchen, Harding & Knight, C. P., attorneys for Mission Rock Co.

No. 682 in U. S. circuit court of appeals for the ninth circuit.

Filed November 6, 1901. F. D. Monckton, clerk.

86 United States circuit court of appeals for the ninth circuit.

MISSION ROCK COMPANY, A CORPORATION, plaintiff in error,
v.
THE UNITED STATES OF AMERICA, DEFENDANT in error. } No. 682.

Certificate of Clerk C. C. A. to transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing eighty-five (85) pages, numbered from one (1) to eighty-five (85), inclusive, to be a true copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 15th day of November, in the year of our Lord one thousand nine hundred and one.

[SEAL.] F. D. MONCKTON, *Clerk.*

87 UNITED STATES OF AMERICA, ss.

The President of the United States, To the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between the Mission Rock Company (a corporation), plaintiff in error, and The United States of America, defendant in error, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of October, in the year of our Lord one thousand nine hundred and one.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

88 *Return to writ error.*

The answer of the judges of the United States circuit court of appeals for the ninth circuit:

As within we are commanded, we certify under the seal of our said circuit court of appeals in a certain schedule to this writ annexed the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

By the court:

[SEAL.] F. D. MONCKTON, *Clerk.*

Due service of a copy of the within writ of error admitted this sixth day of November, 1901.

PAGE, MCCUTCHEN, HARDING & KNIGHT, C. P.,
Attorneys for Defendant in Error.

(Indorsed:) No. 682. In the United States circuit court of appeals for the ninth circuit. The Mission Rock Co. (a corporation) vs. The United States. Writ of error. Filed November 6, 1901. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

89 UNITED STATES OF AMERICA, ss.

To The Mission Rock Company (a corporation), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States this 31st day of October, in the year of our Lord one thousand nine hundred and one.

JOSEPH MCKENNA,
Asso. Justice Supreme Court U. S.

90 On this sixth day of November, in the year of our Lord one thousand nine hundred and one, personally appeared before me, the subscriber, D. D. Jones, and makes affidavit that he delivered a true copy of the within citation to Page, McCutchen, Harding & Knight.

D. D. JONES.

Affirmed and subscribed the 6th day of November, A. D. 1901.

[SEAL.] F. D. MONCKTON.

Due service of a copy of the within citation admitted this sixth day of November, 1901.

PAGE, MCCUTCHEN, HARDING & KNIGHT, C. P.,
Attorneys for Defendant in Error.

(Indorsed:) No. 682. United States circuit court of appeals for the ninth circuit. The Mission Rock Co. (a corporation) v. The United States. Citation. Filed November 6th, 1901. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

(Indorsement on cover:) File No., 18330. U. S. C. C. of appeals, 9th circuit. Term No., 198. The United States, plaintiff in error, vs. The Mission Rock Company. Filed November 25, 1901.

O